

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
The Petition for Reconsideration of the Denial of
Vista Communications, Inc.'s Request for Waiver
of the Installment Payment Rules for the 218-219
MHz Service

ORDER ON RECONSIDERATION

Adopted: February 21, 2003

Released: February 21, 2003

By the Deputy Chief, Wireless Telecommunications Bureau

I. INTRODUCTION

1. We have before us a petition filed by Vista Communications, Inc. ("Vista"), seeking reconsideration of the Auction and Industry Analysis Division's (the "Division") June 12, 2001 Order, which denied Vista's request for waiver of the installment payment rules for the 218-219 MHz Service. For the reasons set forth below, we deny Vista's Petition.

II. BACKGROUND

2. In September of 1994, the Wireless Telecommunications Bureau ("Bureau") announced that Vista was the high bidder for two Interactive Video and Data Service ("IVDS")

1 Vista Communications, Inc., Petition for Reconsideration (filed July 12, 2001) ("Petition").
2 Letter to E. Ashton Johnston, Esq., Counsel for Vista Communications, Inc., from Margaret Wiener, Chief, Auctions and Industry and Analysis Division, 16 FCC Rcd 12430 (2001) ("Vista Order").
3 Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, from E. Ashton Johnston, Esq., dated June 1, 1999 ("Waiver Request"). Vista also filed a supplement to the Waiver Request: Letter to Thomas Sugrue, Chief, WTB, FCC, from E. Ashton Johnston, Esq., dated Dec. 8, 1999 ("Vista Waiver Supplement").
4 47 C.F.R. § 1.2110(d) (1994). We note that after the filing of the Waiver Request, the Federal Communications Commission ("Commission") modified the Part 1 rules, including section 1.2110. Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making, 15 FCC Rcd 15293, 15 FCC Rcd 21520 (2000). However, those modifications are not material to the issues discussed here.

licenses.⁵ As a small business, Vista was eligible to pay for its winning bids through the Commission's installment payment plan.⁶ Grant of the licenses was conditioned upon Vista's full and timely performance of all installment payment obligations.⁷

3. Vista acknowledges that after making its March 31, 1997 installment payments, it ceased making payments on the licenses.⁸ Vista's next installment payment was due on June 30, 1997. The Commission's rules at that time provided that in the event a license holder was more than ninety days delinquent on any installment payment, its license would cancel automatically.⁹ If, during the first ninety days following any missed installment payment, a licensee required additional time to make its payment, the rules allowed the licensee to request that the Commission grant a grace period of three to six months, during which no installment payments need be made.¹⁰ Thus, under the Commission's rules, Vista had until September 28, 1997, to either submit the full amount of the June 30, 1997 installment payments or file a grace period request. Vista did neither,¹¹ and as a result, the licenses automatically canceled on September 29, 1997.

4. On September 17, 1998, the Commission issued the *218-219 MHz Flex Order*, which, among other measures, re-designated IVDS as the 218-219 MHz Service and proposed a financial restructuring scheme that allowed non-defaulting licensees the option of retaining their licenses under reamortized payment obligations or returning their licenses to the Commission in exchange for cancellation of debt, *i.e.*, amnesty.¹²

5. On June 1, 1999, more than 18 months after the licenses canceled, Vista filed a request for waiver of the grace period and automatic cancellation provisions of the installment payment rules.¹³ Vista alleged that its confusion and uncertainty over its installment payment schedule and its lack of knowledge regarding the grace period provisions justified grant of the waiver.¹⁴ In its Waiver Request, Vista also

⁵ Interactive Video And Data Service (IVDS) Applications Accepted For Filing, *Public Notice*, 9 FCC Rcd 6227 (1994) (Vista submitted the winning bids on license IVM135A, Eugene, OR., and license IVM148A, Salem, OR.).

⁶ 47 C.F.R. § 1.2110(d) (1994).

⁷ 47 C.F.R. § 1.2110(d)(4) (1994); Wireless Telecommunications Bureau Staff Clarifies "Grace Period" Rule for IVDS "Auction" Licensees Paying By Installment Payments, *Public Notice*, 10 FCC Rcd 10724 (1995) (WTB) ("*IVDS Grace Period PN*").

⁸ Waiver Request at 5 ("Vista halted its payment out of confusion over the IVDS payment schedule and uncertainty concerning its obligations as a result of the many changes in the overall IVDS payment program. Vista did not file a grace period request at the time because it did not know it was required to do so.").

⁹ 47 C.F.R. § 1.2110(e)(4) (1997).

¹⁰ 47 C.F.R. § 1.2110(e)(4)(ii) (1997).

¹¹ Waiver Request at 6.

¹² Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services (proceeding terminated), *Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd 19064 (1998) ("*219-219 MHz Flex Order*").

¹³ Waiver Request.

¹⁴ *Id.* at 5-7.

argued that the Commission's proposal in the *218-219 MHz Flex Order* to allow licensees that had not made installment payments, but had filed timely grace period requests, to retain their license(s), while refusing to permit licensees that made "substantial payments" to retain their license(s), would be inequitable.¹⁵

6. On September 10, 1999, while Vista's Waiver Request remained pending, the Commission issued the *218-219 MHz Restructuring Order*, which, among other measures, adopted a financial restructuring plan for "Eligible Licensees."¹⁶ Eligible Licensees included those that: (i) were current in installment payments as of March 16, 1998; (ii) were less than ninety days delinquent on the last payment due before March 16, 1998; or (iii) had properly filed grace period requests under the former installment payment rules.¹⁷ "Ineligible Entities" were those that had made second down payments and either (i) made some installment payments, but were not current in their installment payments as of March 16, 1998, and did not have a grace period request on file in conformance with the former rules; or (ii) never made any installment payments and did not have a timely filed grace period request on file.¹⁸ Ineligible Entities were not entitled to participate in the restructuring plan for the 218-219 MHz Service because they lost their licenses through default.¹⁹ Ineligible Entities, however, were granted debt forgiveness for any outstanding balances owed and were informed that their previously paid installments would be refunded.²⁰ Finally, the Commission also delegated to the Bureau and the Office of Managing Director ("OMD") the authority to implement the provisions in the *218-219 MHz Restructuring Order*.²¹

7. Subsequently, on December 3, 1999, Vista filed a petition for reconsideration of the *218-219 MHz Restructuring Order*.²² In this petition, Vista raised the same arguments contained in its Waiver Request. On December 13, 2000, the Commission issued the *218-219 MHz Second Order on*

¹⁵ *Id.* at 7.

¹⁶ Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, 15 FCC Rcd 1497, at 1506, 1517 ¶¶ 15, 31 ("*218-219 MHz Restructuring Order*").

¹⁷ *Id.* at 1520, ¶ 37.

¹⁸ *Id.* at 1520, ¶ 38.

¹⁹ *Id.* at 1518, ¶ 33 (citing 47 C.F.R. § 1.2110); *see also* Letter to J. Jeffrey Craven, Esq., Counsel for IVIDCO, L.L.C., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 16 FCC Rcd 7236 (2001) ("*IVIDCO Order*"); Letter to Fred D. Middleton, Jr., President, P.A.W., Inc., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 16 FCC Rcd 3473 (2001).

²⁰ *218-219 MHz Restructuring Order*, 15 FCC Rcd at 1520, ¶ 38; Implementation Procedures for the Report and Order and Memorandum Opinion and Order Addressing the 218-219 MHz Services (Formerly Known As Interactive Video And Data Services (IVDS)), *Public Notice*, 15 FCC Rcd 7329 (WTB 2000) (noting that the Department of Justice authorized the reduction of debt owed to the United States in accordance with the debt relief provisions of the *218-219 MHz Order*) ("*Implementation Public Notice*"); Wireless Telecommunications Bureau Announces Revised Election Date and Amends Eligibility List for 218-219 MHz Service, *Public Notice*, 16 FCC Rcd 5937 (2001) ("*Election Public Notice*").

²¹ *218-219 MHz Restructuring Order*, 15 FCC Rcd at 1529, ¶ 54.

²² Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, Petition for Reconsideration and Clarification, submitted by Vista Communications, Inc. (Dec. 3, 1999).

Reconsideration,²³ which, among other things, affirmed the definition of Eligible Licensee set forth in the *218-219 MHz Restructuring Order*²⁴ and rejected Vista's petition for reconsideration of the *218-219 MHz Restructuring Order*.²⁵

8. Pursuant to its delegated authority, the Bureau sent individual letters on January 6, 2000, to former and current 218-219 MHz licensees confirming their status.²⁶ The letter sent to Vista confirmed that it was not eligible to participate in the restructuring plan.²⁷ Additionally, on April 20, 2000, the Bureau issued two public notices explaining the restructuring procedures.²⁸ One of those public notices, the *Implementation Public Notice*, included a list of entities that would be eligible to participate in the 218-219 MHz restructuring plan.²⁹ Vista was not among those listed as eligible.³⁰

9. On January 3, 2001, the Bureau released a public notice containing information regarding election procedures and also including an amended list of Eligible Licensees.³¹ Again, Vista was not among those listed as eligible for participation in the restructuring plan. Vista did not dispute the Bureau's confirmation of Vista's status in the *Vista Ineligibility Letter*, nor did it dispute that it was not included in the list of eligible entities in the *Implementation Public Notice* or the *Election Public Notice*.

10. On April 9, 2001, Vista filed a petition for review of the orders implementing the Commission's comprehensive restructuring of the 218-219 MHz Service before the United States Court of Appeals for the District of Columbia Circuit.³² It remains pending.

11. On June 12, 2001, the Division issued an order denying Vista's Waiver Request.³³ In the *Vista Order*, the Division described Vista's allegations in detail and explained that Vista's alleged confusion regarding the application of the installment payment rules and its installment payment schedule

²³ Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 25020 (2000) ("*Second Order on Reconsideration*").

²⁴ *Id.* at 25031-25033, 25043, ¶¶ 24-29, 50.

²⁵ *Id.*

²⁶ See, e.g., Letter to Elizabeth Michaels, from Rachel Kazan, Chief, Auctions Finance and Market Analysis Branch, Wireless Telecommunications Bureau, dated January 6, 2000 ("*Vista Ineligibility Letter*").

²⁷ *Id.*

²⁸ *Implementation Public Notice*, 15 FCC Rcd 7329; Frequently Asked Questions Regarding the Restructuring Rules for the 218-219 MHz Service, *Public Notice*, 15 FCC Rcd 7305 (2000). The Bureau also had previously released a public notice containing preliminary implementation procedures on December 28, 1999. Wireless Telecommunications Bureau Announces Preliminary Implementation Procedures for 218-219 MHz Service (Formerly known as Interactive Video and Data Service (IVDS)), *Public Notice*, 15 FCC Rcd 22 (1998).

²⁹ *Implementation Public Notice*, 15 FCC Rcd 7329.

³⁰ *Id.*

³¹ *Election Public Notice*, 16 FCC Rcd 5937.

³² *Vista Communications, Inc. v. FCC*, No. 01-1168 (D.C. Cir, filed April 9, 2001).

³³ *Vista Order*, 16 FCC Rcd 12430.

did not justify grant of the Waiver Request.³⁴ As part of this determination, the Division found that Vista's assumption that it could withhold payments despite the Commission's repeated notification of the consequences that would flow from failure to make full and timely installment payments was unreasonable.³⁵ In making this determination, the Division took notice of the Commission's prior conclusion, in the context of Vista's challenge to the *218-219 MHz Restructuring Order*, that "even the most favorable reading of the Commission's Orders and letters to licensees would not reasonably lead a licensee to believe that it was excused from its obligation to make payments, or that it did not need to file a grace period request if it determined that it could not make timely payments."³⁶ The Division also explained that Vista, just as every Commission licensee, was charged with knowledge of the applicable regulations.³⁷ Thus, the Division found that Vista's alleged lack of knowledge with respect to the grace period rules also did not justify waiver of the rules and it had failed to demonstrate unique or unusual circumstances that would warrant waiver of the rules.³⁸

12. The Division also addressed Vista's contention that enforcement of the rules that resulted in the automatic cancellation of Vista's license would be inequitable and contrary to the underlying purpose of the rules.³⁹ Vista alleged that it would be unfair to allow licensees that made no installment payments, but filed timely grace period requests, to retain their licenses, while refusing to permit licensees that had made "substantial payments," such as Vista, to retain their licenses.⁴⁰ The Division noted that the Commission had previously rejected this argument when Vista raised it as part of a reconsideration petition essentially seeking to change the definition of "Eligible Licensee" to include those who had made "substantial payments."⁴¹ The Division also explained that strict enforcement of the Commission's payment rules ensures that applicants have the necessary financial qualifications to be a Commission licensee and that spectrum is awarded to those qualified bidders who value the spectrum most.⁴² Further, the Division stated that insisting that licensees demonstrate their ability to pay as a condition to holding licenses is essential to a fair and efficient licensing process, is fair to all participants in the Commission's auctions, including those who won licenses in the auctions and those who did not, and fosters the promotion of economic opportunity and competition in the marketplace.⁴³

³⁴ *Id.* at 12433-12435.

³⁵ *Id.*

³⁶ *Id.* at 12433 (citing *218-219 MHz Second Order on Reconsideration*, 15 FCC Rcd at 25032, ¶ 28).

³⁷ *Id.* at 12434, note 38 (citing 47 C.F.R. 0.406 "Persons having business with the Commission should familiarize themselves with those portions of its rules and regulations pertinent to such business").

³⁸ *Id.* at 12434-12435.

³⁹ *Id.*

⁴⁰ Waiver Request at 7.

⁴¹ *Vista Order*, 16 FCC Rcd at 12435 (citing *218-219 MHz Second Order on Reconsideration*, 15 FCC Rcd at 25032, ¶ 27).

⁴² *Id.* at 12436.

⁴³ *Id.* at 12436 (citing *218-219 MHz Second Order on Reconsideration*, 15 FCC Rcd at 25033, ¶ 29).

13. Finally, in the *Vista Order* the Division denied Vista's request, made in the alternative, to make retroactive payment.⁴⁴ In explaining its decision, the Division observed that, in essence, this request sought a change to the Commission's eligibility rules and this change had previously been denied by the Commission.⁴⁵ In the *218-219 MHz Second Order on Reconsideration*, the Commission specifically rejected Vista's proposal that the Commission reconsider the *218-219 MHz Restructuring Order* to allow retroactive payments by former licensees such as Vista.⁴⁶ The Commission determined that granting Vista's request would undermine the Commission's rules requiring timely and full payment as a condition of retaining the license.⁴⁷ The Commission concluded that in light of the ample notice provided licensees regarding the payment rules,⁴⁸ and the generous provisions for Ineligible Entities provided in the *218-219 MHz Restructuring Order*, Vista's suggestion that it be allowed to make retroactive payments was unsupported.⁴⁹ Thus, in keeping with the Commission's earlier rejection of this suggestion, the Division rejected Vista's proposal to allow it to make retroactive payments in order to become eligible for participation in the 218-219 MHz Service restructuring plan.⁵⁰

14. On July 12, 2001, Vista filed the instant Petition.

III. DISCUSSION

15. In its Petition, Vista argues that the Division failed to properly consider its Waiver Request.⁵¹ Specifically, Vista alleges that the Division failed to consider the effect that changes to the installment payment schedule had upon Vista.⁵² Vista also alleges that the 218-219 MHz restructuring plan is inequitable.⁵³ Finally, Vista contends that the Division failed to address precedent cited in the Waiver

⁴⁴ *Id.*

⁴⁵ *Id.* at 12435 (citing *218-219 MHz Second Order on Reconsideration*, 15 FCC Rcd at 25033, ¶ 29).

⁴⁶ *218-219 MHz Second Order on Reconsideration*, 15 FCC Rcd at 25033, ¶ 29 (cited in *Vista Order*, 16 FCC Rcd at 12436); *see also* *IVIDCO Order*, 16 FCC Rcd 7236.

⁴⁷ *218-219 MHz Second Order on Reconsideration*, 15 FCC Rcd at 25033 ¶ 29 (cited in *Vista Order*, 16 FCC Rcd at 12436).

⁴⁸ *Id.*; 47 C.F.R. § 1.2110(e)(4)(ii)(1994); *IVDS Grace Period PN*, 10 FCC Rcd 10724; *see also* Interactive Video and Data Service (IVDS) Licenses, Various Requests by Auction Winners, *Order*, 11 FCC Rcd 1282, at 1285 ¶ 19 (1995) ("*IVDS Omnibus Order*").

⁴⁹ *218-219 MHz Second Order on Reconsideration*, 15 FCC Rcd at 25033 ¶ 29 (cited in *Vista Order*, 16 FCC Rcd at 12436).

⁵⁰ *Vista Order*, 16 FCC Rcd at 12436.

⁵¹ Petition at 2, 13-14, (citing *BellSouth Corp. v. FCC*, 162 F.3rd 1215, 1224 (D.C. Cir. 1999); 21st Century Telesis, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 25113 (2000), *aff'd on recon*, 16 FCC Rcd 17257(2001) ("*21st Century*"), *aff'd*, *21st Century Telesis Joint Venture and 21st Century Bidding Corporation v. FCC*, No. 01-1435, 2003 WL 203126 (D.C. Cir. Jan. 31, 2003); *WAIT Radio v. FCC*, 413 F.2d 1153, 1157 (D.C. Cir. 1969) (government agencies must give waiver requests a "hard look" and not a perfunctory denial. The "hard look" requirement assures that a general rule serving the public interest for a broad range of situations will not be rigidly applied where its application would not be in the public interest)).

⁵² Petition at 2-11.

⁵³ Petition at 6; Waiver Request at 7.

Request that supports the grant of a waiver in this instance.⁵⁴ For the reasons set forth below, we affirm the Division's *Vista Order* and deny the Petition.

16. In the Waiver Request, Vista alleged that it withheld payments out of confusion over the payment schedule and uncertainty concerning its obligations as a result of changes in the payment program.⁵⁵ Vista pointed to changes to the installment payment plan,⁵⁶ including postponement of the date for the initial installment payment,⁵⁷ and correspondence from the Commission⁵⁸ to support its allegation that it was confused and, therefore, appropriately withheld installment payments after making the March 31, 1997 installment payment.⁵⁹ As we have noted above, the Division fully examined each of Vista's allegations in detail and found that Vista's alleged lack of knowledge with respect to the grace period rules and alleged confusion failed to demonstrate unique or unusual circumstances that would warrant waiver of the rules.⁶⁰ For example, the Division explained that the public notices and correspondence upon which Vista based its Waiver Request included explanations of the installment payment rules and the availability of grace periods.⁶¹ Ultimately, Vista's request for waiver of the automatic cancellation and grace period provisions of the installment payment rules was denied, not because the Division failed to consider the request as required under the "hard look" standard, but because it found, as we do here, that Vista has not met the Commission's standards for granting a waiver request.⁶² Thus, the Division appropriately concluded that Vista had failed to establish a basis for waiver of the Commission's rules.⁶³

17. With respect to Vista's contention that the 218-219 MHz financial restructuring plan is inequitable, as the Division noted, the Commission has previously considered and rejected this argument in the *218-219 MHz Second Order on Reconsideration*.⁶⁴ Repetitious petitions such as this one can potentially delay judicial review where the request places again before the Commission the same issues it

⁵⁴ Petition at 11-13.

⁵⁵ Waiver Request at 5.

⁵⁶ Waiver Request at 2; Petition at 4.

⁵⁷ Waiver Request at 3; Petition at 3-4.

⁵⁸ Waiver Request at 3-4; Petition at 5-6.

⁵⁹ Petition at 6.

⁶⁰ *Vista Order* at 12433-12435 (applying the waiver criteria of 47 C.F.R. § 1.925).

⁶¹ *Id.* at 12433-12434.

⁶² An entity requesting a waiver must demonstrate that either (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application in the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances in the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. 47 C.F.R. § 1.925(b)(3).

⁶³ *Vista Order*, 16 FCC Rcd at 12433 (quoting the *218-219 MHz Second Order on Reconsideration*, 15 FCC Rcd at 25032, ¶¶ 27-28); see 47 C.F.R. § 1.2110(d)(4)(ii) (1994); *IVDS Grace Period Public Notice*, 10 FCC Rcd 10724; *IVDS Omnibus Order*, 11 FCC Rcd at 1285.

⁶⁴ *218-219 MHz Second Order on Reconsideration*, 15 FCC Rcd at 25031, ¶ 25.

already has addressed with respect to the same party or similar parties in other contexts.⁶⁵ Vista has failed to justify further consideration here of arguments previously rejected by the Commission.⁶⁶ Accordingly, we see no reason to revisit the issue here.

18. With respect to Vista's allegation that the Division failed to address certain orders cited in the Waiver Request,⁶⁷ we find that Vista's characterization of those cases was incorrect, and Vista supplied such minimal argument in support of its characterization that the Division was not required to explain how those cases were inapplicable. As we explain below, of the two lines of cases cited by Vista, the first does not involve a waiver analysis applicable to the installment payment rule, and the second involves circumstances that Vista does not allege were present.

19. The first line of orders Vista cited in the Waiver Request involve requests by winning bidders to waive the Commission's down payment or final payment rules, not the installment payment rules.⁶⁸ The Commission has granted a partial waiver of a down payment or final payment deadline only where the winning bidder's failure to pay was based on inadvertent error, the bidder immediately remitted payment, and the bidder provided evidence of an ability to pay at the time of the original deadline.⁶⁹ Thus, Vista was incorrect in citing those cases for the overly broad proposition that "the Commission has

⁶⁵ Where the same subject matter is pending before the Commission on a reconsideration petition filed by another party, the courts typically hold judicial review in abeyance until all related actions are resolved by the Commission. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 23 n.27 (D.C. Cir., cert. denied, 434 U.S. 829 (1997)); *Wrather-Alvarez Broadcasting, Inc. v. FCC*, 248 F.2d 646, 648-49 (D.C. Cir. 1957) (holding judicial review in abeyance until administrative reconsideration has been completed with respect to parties who are not parties to the reconsideration petition); *see also Celtronix Telemetry, Inc. v. FCC*, 2001 WL 799945 (D.C. Cir. 2001); *Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994); *Southland Industries v. FCC*, 99 F.2d 117 (1938).

⁶⁶ It is a waste of administrative resources to address arguments regarding the equity of a Commission rule through a waiver petition where the Commission has already addressed the specific arguments when they were raised in a challenge to the adoption of the rule. *See Turro v. FCC*, 859 F.2d 1498, 1500 (DC Cir. 1988) (upholding the Commission's decision to address via rulemaking, rather than through individual *ad hoc* waiver proceedings, two questions of policy that were virtually identical to each other, one raised by way of a waiver request and the other by way of petition for reconsideration).

⁶⁷ Petition at 11; Waiver Request at 7 (citing Mountain Solutions Ltd, Inc., Emergency Petition for Waiver of Section 24.711(A)(2) of the Commission's Rules regarding Various BTA Markets in the Broadband Personal Communications Services (PCS) C Block Auction, *Memorandum Opinion and Order*, 13 FCC Rcd 21983 (1998) ("*Mountain Solutions*"); Carolina PCS I Limited Partnership Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding BTA Nos. B016, B072, B091, B147, B177, B178, B312, B335, AND B436, Frequency Block C, *Memorandum Opinion and Order*, 12 FCC Rcd 22938, (1997) ("*Carolina PCS*"); Metricom, Inc's Request for Waiver of Section 27. 208(a) of the Commission's Rules for Wireless Communications Service Markets: ME30A, ME45A, ME46A, RE01D, RE05C, RE05D, RE06C, RE06D, *Order*, 13 FCC Rcd 890 (WTB 1998) ("*Metricom*"); Magnacom Wireless, L.L.C. Request for Waiver of Section 24.716(a)(2) of the Commission's Rules, *Order*, 13 FCC Rcd 766 (1998) ("*Magnacom*"); Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, to Lloyd W. Coward, Esq., Counsel for TE-MCG Consortium, 14 FCC Rcd 2173 (1999) ("*TE-CMG*"); Letter from Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, to Thomas Gutierrez, Esq., Counsel for Lancaster Communications, Inc., DA 98-2052 1998 WL 709412 (1998) ("*Lancaster*").

⁶⁸ Waiver Request at 7 (citing *Mountain Solutions*, 13 FCC Rcd 21983; *Carolina PCS*, 12 FCC Rcd 22938; *Magnacom*, 13 FCC Rcd 766 *Metricom*, 13 FCC Rcd 890).

⁶⁹ Southern Communications Systems, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd at 25109-25111, ¶¶ 13-15 (2000) ("*Southern Communications*") (distinguishing the analysis of requests for waiver of the installment payment rules from requests for waiver of the down payment rules in light of the different provisions and purposes of those rules).

granted relief from installment payment obligations where the licensee at all times had the money when it was due.”⁷⁰

20. In *Southern Communications*, the Commission explained in detail that requests for waiver of a winning bidder’s down payment or final payment obligation are of limited applicability with respect to a licensee’s request for waiver of its installment payment obligation.⁷¹ In that order, the Commission noted that prior limited waivers of down payment obligations do not provide support for waiver of an installment payment obligation because the installment payment rule has a function, purpose, and burden different from the down and final payment rules.⁷² Thus, the Commission concluded that the limited instances where a partial waiver of the down payment rule or the final payment rule has been granted failed to provide a basis for granting Southern Communications, Inc.’s request for waiver of its installment payment obligations.⁷³ In light of the fact that Vista failed to explain how the down payment precedent applied to its Waiver Request, and given that *Southern Communications* clearly explained that such precedent was inapplicable, the Division was not required to specifically explain how the cited precedent was unavailing in this instance.

21. The second line of orders cited in Vista’s Waiver Request involved the constructive waiver of the automatic cancellation rule. The two orders cited, *TE-MCG* and *Lancaster*,⁷⁴ were instances where as a result of administrative oversight, it was determined that a constructive waiver of the installment payment deadlines had occurred.⁷⁵ In contrast to *TE-MCG* and *Lancaster*, in this instance the Commission did not act in a way that could have been construed as waiving the installment payment deadline for the June 30, 1997 installment payments.⁷⁶ In light of Vista’s failure to offer to demonstrate or to argue how any Commission actions rose to the level of constructive waiver, the Division was not required to specifically explain how these orders were inapplicable to Vista’s request.⁷⁷

IV. ORDERING CLAUSES

⁷⁰ Waiver Request at 7.

⁷¹ *Southern Communications*, 15 FCC Rcd 25103.

⁷² *Id.* at 25109-25110, ¶¶ 13-15.

⁷³ *Id.* at 25110, ¶ 15.

⁷⁴ Waiver Request at 7 (citing *TE-CMG*, 14 FCC Rcd 2173; *Lancaster*, 1998 WL 709412).

⁷⁵ *TE-CMG*, 14 FCC Rcd 2173; *Lancaster*, 1998 WL 709412. We note that the Court of Appeals for the District of Columbia Circuit has rejected attempts to expand the limited scope of the constructive waiver cases. See Requests for Extension of the Commission’s Initial Non-Delinquency Period for C and F Block Installment Payments, *Order*, 13 FCC Rcd 22071 (1998), *aff’d econ*, Requests for Extension of the Commission’s Initial Non-Delinquency Period for C and F Block Installment Payments, *Memorandum Opinion and Order*, 14 FCC Rcd 6080 (1999), *aff’d*, *SouthEast Telephone v. FCC*, 15 FCC Rcd 17500, 17517) No. 99-1164, (D.C. Cir. Nov. 24, 1999) (concluding that “the mere fact that the agency granted TE-MCG’s request does not require it to grant petitioner’s request.”).

⁷⁶ See *21st Century*, 16 FCC Rcd at 17265 ¶¶ 20-21 (petitioner did not provide a basis for reconsideration of a previous Commission order, denying a request for waiver of a payment deadline, where the petitioner did not allege that the Commission acted in a way that could have been construed as waiving a payment deadline).

⁷⁷ In its Petition, Vista also fails to provide any facts in support of constructive waiver, but rather takes issue with the Commission’s established view of the significance of these cases. Petition at 11-13. Vista’s attempt to reconstrue these decisions is unavailing and does not change our analysis here.

22. Accordingly, for the foregoing reasons, IT IS ORDERED that, pursuant to Sections 4(i), 303(r), 309(j), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(j), and 405, and sections 0.331 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.106, the Petition for Reconsideration filed by Vista Communications Inc. IS DENIED.

23. It is FURTHER ORDERED that copies of this Order on Reconsideration will be sent to Vista Communications Inc. and its representative by certified mail, return receipt requested

FEDERAL COMMUNICATIONS COMMISSION

Kathleen O'Brien Ham
Deputy Chief
Wireless Telecommunications Bureau